

FEDERAL ELECTION COMMISSION 2017 JAN 18 PM 4: 39
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT CELA

MUR: 6803
DATE COMPLAINT FILED: Apr. 3, 2014
DATE OF NOTIFICATION: Apr. 10, 2014
LAST RESPONSE RECEIVED: Apr. 25, 2014
DATE ACTIVATED: Nov. 15, 2016

EXPIRATION OF SOL: Feb. 1, 2018

ELECTION CYCLE: 2014

COMPLAINANT:

Joe H. Beasley

RESPONDENTS:

Thomas E. Brown
Thomas Brown for Congress (formerly
Citizens 4 Thomas Brown Exploratory
Committee) and George D.N. Coletti in his
official capacity as treasurer
Thomas E. Brown Jr. Sheriff
Jackson Barksdale
Courtesy Ford, Inc.

RELEVANT STATUTES
AND REGULATIONS:

52 U.S.C. § 30101(2), (8)(A)
52 U.S.C. § 30102(e)(1)
52 U.S.C. § 30103(a)
52 U.S.C. § 30104(a), (b)
52 U.S.C. § 30116(a), (f)
52 U.S.C. § 30118(a)
52 U.S.C. § 30120(a)
52 U.S.C. § 30125(e)(1)
11 C.F.R. § 100.52(d)
11 C.F.R. § 100.72(a), (b)
11 C.F.R. § 100.131(a), (b)
11 C.F.R. § 110.11(a), (b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

1704441-1440/2

I. INTRODUCTION

The Complaint alleges that Thomas Brown, a 2014 candidate in the Democratic Primary for Georgia's Fourth Congressional District, and his principal campaign committee, Thomas Brown for Congress (formerly Citizens for Thomas Brown Exploratory) and George D.N. Coletti in his official capacity as treasurer ("Federal Committee")¹ committed various violations of the Federal Election Campaign Act of 1971, as amended ("the Act").² Specifically, the Complaint alleges that Brown, the former Sheriff for DeKalb County, Georgia, used \$12,000 in non-federal funds from Brown's state political committee, Thomas E. Brown Sheriff ("State Committee") to pay for polling that benefited his federal campaign.³ The Complaint also alleges that Brown and the Committee untimely filed its Statements of Candidacy and Organization.⁴ Further, the Complaint alleges that the Federal Committee accepted either a prohibited or excessive in-kind contribution in the form of advertisements on an electronic billboard, and the advertisements lacked disclaimers.⁵ Finally, the Complaint alleges various other disclaimer and reporting issues.⁶

As set forth below, we recommend that the Commission: (1) find reason to believe that Brown, the Federal Committee, and the State Committee violated the Act in connection

¹ The Committee was allowed to terminate as a reporting entity on June 11, 2015. See <http://docquery.fec.gov/pdf/711/15330083711/15330083711.pdf>.

² Compl. at 1-2 (April 3, 2014). Brown lost the May 2014 primary election.

³ Compl. at 2.

⁴ Compl. at 1-2.

⁵ Compl. at 4-5.

⁶ Compl. at 6.

1 with the \$12,000 in polling expenses paid for by the State Committee, and that Brown and
2 the Committee filed late Statements of Candidacy and Organization; enter into pre-probable
3 cause conciliation with these Respondents; and approve the attached conciliation agreement.
4 We further recommend that the Commission exercise its prosecutorial discretion and
5 dismiss the remaining allegations.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Background**

8 Brown was re-elected to a four-year term as Sheriff of DeKalb County, Georgia, in
9 2012.⁷ On July 17, 2013, Brown announced the formation of an exploratory committee for
10 a possible 2014 congressional candidacy.⁸ On September 12, 2013, Brown decided to
11 become a candidate,⁹ and on October 30, 2013, Brown filed a Statement of Candidacy and
12 his Committee's Statement of Organization.¹⁰

⁷ See Georgia Government Transparency and Campaign Finance Commission at http://media.ethics.ga.gov/search/campaign/Campaign_Name.aspx?NameID=10929&FilerID=C2011002303&Type=candidate. Brown resigned in July 2014 in order to run for Congress.

⁸ Compl., Attach. 8. (News report of Brown's announcement of exploratory committee).

⁹ Response at 1 (Apr. 25 2014). This response was filed on behalf of Brown and the Committee, and will be referred to as "Brown Response."

¹⁰ FEC Form 2, Statement of Candidacy for Thomas Brown at <http://docquery.fec.gov/pdf/185/13031134185/13031134185.pdf>; FEC Form 1, Statement of Organization for Thomas Brown for Congress at <http://docquery.fec.gov/pdf/190/13031134190/13031134190.pdf>. While Brown claims to have mailed the forms to the Commission in mid-September 2013, the Commission did not receive them until October 30, 2013. Resp. at 1. A copy of an Express Mail envelope attached to the Complaint indicates that the statements were not mailed until October 29, 2013. Compl., Attach. 2 (Express Mail envelope).

B. Pre-Candidacy Activities

1. There is Reason to Believe that Brown's State Committee Paid for Polling Used for his Federal Campaign

In January and February 2013, the State Committee made two payments of \$6,000 each (\$12,000 total) to a vendor for a telephone poll.¹¹ The Complaint alleges that the poll was conducted throughout Georgia's Fourth Congressional District and tested Brown's name recognition and popularity against Fourth Congressional District Representative Hank Johnson, DeKalb County Commissioner Lee May, and former DeKalb County District Attorney Gwen Keyes Flemming, all purported potential candidates for the 2014 Congressional race.¹² Complainant argues that the poll must have been conducted for federal purposes because Brown did not face re-election as Sheriff until 2016 and the poll included some Fourth District residents who lived outside DeKalb County.¹³

Respondents acknowledge that the State Committee funded the telephone poll to assess Brown's visibility and approval ratings, but contend that it was conducted only in DeKalb County for what Brown describes as "my own political purposes."¹⁴ Respondents do not dispute that the poll tested Brown's name recognition against potential 2014

¹¹ In campaign finance reports filed with the Georgia Ethics Commission on July 1, 2013, the State Committee disclosed two expenditures, one on January 24, 2013, and the other on February 24, 2013, paid to "HEG" for the purpose of "Research." Documents attached to the Complaint indicate that HEG is a political consulting firm, and it offers polling services. Compl., Attach. 4 at 1-2.

¹² Compl. at 2-3.

¹³ *Id.*

¹⁴ Brown Resp. at 1-2.

1 congressional candidates nor do they deny that the polling was used to assess the viability of
2 Brown's 2014 Congressional candidacy.¹⁵

3 Under the Act, a federal candidate, the agent of a candidate, or an entity directly or
4 indirectly established, financed, maintained, or controlled by, or acting on behalf of a
5 candidate, shall not "solicit, receive, direct, transfer, or spend funds in connection with an
6 election for Federal office" unless the funds are subject to the Act's "limitations,
7 prohibitions, and reporting requirements."¹⁶ Moreover, Commission regulations prohibit the
8 transfer of funds or assets from a candidate's nonfederal campaign committee to his or her
9 federal campaign committee.¹⁷ Federal political committees are required to report
10 contributions received from individuals and political committees, and no candidate or
11 political committee shall knowingly accept any prohibited or excessive contribution.¹⁸

12 An individual becomes a "candidate" when he or she receives or makes in excess of
13 \$5,000 in contributions or expenditures.¹⁹ However, Commission regulations provide that

¹⁵ See Brown Resp. at 1-2.

¹⁶ 52 U.S.C. § 30125(e). Disclosure reports filed with the Georgia Transparency and Campaign Finance Commission show numerous corporate monetary and in-kind contributions made to and accepted by the State Committee.
http://media.ethics.ga.gov/search/campaign/Campaign_Name.aspx?NameID=10929&FilerID=C2011002303&Type=candidate.

¹⁷ 11 C.F.R. § 110.3(d). *See, e.g.*, MUR 6267 (Paton For Senate) (Paton's federal committee received prohibited transfer of funds when Paton's state senate committee paid for polling and a survey benefiting his federal campaign); MUR 5646 (Cohen for New Hampshire) (Cohen's federal committee received prohibited transfer of funds when Cohen's state committee paid for start-up expenses related to his U.S. Senate campaign); and MUR 5426 (Dale Schultz for Congress) (Schultz's federal committee received prohibited transfer of funds when the Schultz state committee paid for expenses that the candidate incurred in connection with his federal election).

¹⁸ 52 U.S.C. §§ 30104(b); 30116(a)(2)(A); 30116(f).

¹⁹ 52 U.S.C. § 30101(2).

1 the terms "contribution" and "expenditure" do not include funds or payments made solely to
2 determine whether an individual should become a candidate.²⁰ These "testing the waters"
3 activities include polling, among other things.²¹ However, all funds used for "testing the
4 waters" activities must be permissible under the Act.²² An individual may form an
5 exploratory committee solely for the purposes of testing the waters, which is not defined as a
6 "political committee" and, therefore, not required to register with the Committee and file
7 disclosure reports.²³ If the individual subsequently become a candidate, the funds received
8 and payments made become contributions and expenditures, respectively, subject to the
9 Act's reporting requirements.²⁴ Georgia law permits corporations and unions to make
10 political contributions.²⁵

11 This "testing the waters" exemption is no longer available after an individual
12 becomes a candidate by raising or spending more than \$5,000 and engages in campaigning
13 activities which indicate that he or she has decided to run for a particular office.²⁶ This

²⁰ 11 C.F.R. §§ 100.72(a) and 100.131(a).

²¹ *Id.*

²² *Id.*

²³ See Advisory Op. 1979-26 (Grassley) at 1-2. If the individual subsequently becomes a candidate, the funds received and spent become contributions and expenditures and must be reported with the first report filed by the campaign committee of the candidate 11 C.F.R. §§ 100.72(a) and 100.131(a).

²⁴ *Id.*

²⁵ See O.C.G.A. § 21-5-41 to 43 (Contribution to candidates for public office, including contribution limitations).

²⁶ 11 C.F.R. §§ 100.72(b) and 100.131(b).

1 includes making written or oral statements that refer to himself or herself as a candidate, and
2 conducting activities in close proximity to the election.²⁷

3 When an individual becomes a "candidate," the Act requires the candidate to file a
4 Statement of Candidacy designating a candidate's principal campaign committee within
5 fifteen days, and requires the principal campaign committee to file a Statement of
6 Organization no later than ten days after the candidate's designation.²⁸

7 Based on the available information, it appears that Brown used State Committee
8 funds to pay for a poll to help him decide whether to run for Congress in 2014. In addition
9 to the alleged name testing against potential congressional candidates and the proximity to
10 the announcement of his exploratory efforts, two different contemporaneous news articles
11 attached to the Complaint quote Brown—when talking about his potential candidacy—as
12 stating that he had "one set of encouraging poll numbers but was waiting to see more."²⁹ It
13 is reasonable to assume that the set of poll numbers to which Brown referred was the set
14 from the poll paid for by his State Committee. Further, Brown states that he ordered the poll
15 for "his own political purposes," which is not inconsistent with considering a federal
16 candidacy, as the Complaint alleges. The most reasonable conclusion is that Brown used
17 poll results paid for by his State Committee to test the waters for a federal candidacy. Thus,

²⁷ *Id.*

²⁸ 52 U.S.C. §§ 30102(e)(1) and 30103(a).

²⁹ Compl. Attach. 1, Rockdale News, *DeKalb County Sheriff Thomas Brown Announced Formation of an Exploratory Committee for a Bid for the Fourth Congressional Seat* (July 17, 2014); Attach 8, WXIA TV, *Sheriff Brown Gauges run Against Rep. Johnson* (July 17, 2014).

1 there is reason to believe that Brown and the Committee received assets from his State
2 Committee, and did not report the transfer.

3 Accordingly, we recommend that the Commission find reason to believe that Brown,
4 the Federal Committee, and the State Committee violated 52 U.S.C. § 30125(e)(1)(A) and
5 11 C.F.R. § 110.3(d), and the Brown Committee violated 52 U.S.C. § 30104(b) and enter
6 into pre-probable cause conciliation with these Respondents.

7 **2. There is Reason to Believe that Brown and his Committee Filed**
8 **Untimely Statements of Candidacy and Organization**
9

10 In his response, Brown states that he became a candidate on September 12, 2013, but
11 the Commission's records show that he filed his Statement of Candidacy on October 30,
12 2013, and the Committee filed its Statement of Organization the same day. Thus, the
13 candidacy statement should have been filed by September 27, 2013, and the organizational
14 statement was due on October 7, 2013, making the actual filings 33 and 23 days late,
15 respectively. Accordingly, there is reason to believe that Brown and his Committee violated
16 52 U.S.C. §§ 30102(e)(1) and 30103(a), respectively.³⁰

17 Because these statements were not filed timely, Brown's Committee also failed to
18 file a 2013 October Quarterly Report, and did not file its initial report until January 2014. In

³⁰ Some of Brown's July statements might be interpreted to mean that he had already decided to run for Congress when he announced his exploratory committee on July 17, 2013 ("I do want to go to Congress," and "I'm running on being an effective leader for the fourth district"), but other reported statements from the same press conference suggest he was only considering a run ("Brown says his fundraising prowess in the next few weeks will help him make a final decision on his congressional candidacy.") See Compl., Attach . 8. Because the information is ambiguous, and our recommendations would not change even if Brown were considered a candidate as of July 2013, we do not need to analyze this issue further.

1 such circumstances, the Commission usually pursues these violations,³¹ and we recommend
2 the Commission do so here.

3 **C. Post-Candidacy Activity**

4 **1. The Commission Should Dismiss the Allegations Regarding the**
5 **Billboard**

6
7 Starting in October 2013 and apparently continuing until Georgia's primary election
8 in May 2014, Brown's name was displayed on an electronic billboard at a car dealership
9 called Courtesy Ford, Inc., which is located beside a major interstate highway.³² The
10 Complainant states that a supporter posted a photograph of the sign on Brown's Facebook
11 page and wrote that the sign was donated to Brown by an anonymous contributor.³³
12 Photographs attached to the Complaint show two messages on the billboard: one that
13 simply displays Brown's name next to a checked box, and another that displays Brown's
14 headshot and reads, "Tom Brown for Congress/Vote Tuesday, May 20th."³⁴

15 The Complaint alleges that Brown and the Committee accepted a potentially
16 excessive and prohibited corporate in-kind contribution related to the advertisement.³⁵ The
17 Complaint also asserts that the billboard never included a disclaimer indicating who paid for

³¹ See e.g., MUR 6449 (Bruning), MUR 6314 (Brown) (Statement of Candidacy filed 74 days late), MUR 5693 (Aronsohn) (Statement of Candidacy filed 90 days late), and MUR 5363 (Sharpton). The Commission has dismissed similar violations when the late candidacy and organizational filings did not cause the candidate's principal campaign committee to miss a required disclosure report. See e.g., MUR 6815 (Scott Brown) and MUR 6785 (Kwasman).

³² *Id.*

³³ Compl. at 4-5; Attach. 9. The Facebook page of Thomas Brown for Congress no longer contains any posts.

³⁴ Compl. Attach. 9.

³⁵ Compl. at 4-5.

1 the ad, in violation of 52 U.S.C. § 30120(a)(2), and that the Committee did not disclose
2 either an expenditure or an in-kind contribution for the billboard advertising.³⁶ Complainant
3 estimates the value of the billboard to be as high as \$11,225.³⁷

4 The Brown Respondents state that in the summer of 2013, Jay Barksdale, an
5 executive with "an automobile dealership in Rockdale County," heard about the possibility
6 of Brown's run for Congress and approached him about making a campaign billboard that he
7 owned available to Brown's campaign.³⁸ Brown says that he told Barksdale that if he
8 decided to become a candidate, he would accept the offer to use the billboard.³⁹ The Brown
9 Respondents further contend that before Brown declared his candidacy, Barksdale, without
10 any request from Brown or his Committee, placed the name "Tom Brown" and a checkmark
11 on the billboard.⁴⁰ The message did not explain who Brown was or that he was running for
12 any office. Brown further declared that he believed that Barksdale, as the purported owner,
13 was free to place whatever message he desired on his billboard.⁴¹ Starting in 2014, after
14 Brown announced his candidacy, the Federal Committee reported the billboard

³⁶ *Id.*

³⁷ To value the cost of the advertisement, the Complainant relies on the monthly rate (\$2,250 per month) quoted by Lamar Advertising Company, a billboard advertising company in the Atlanta area, for what he contends is a similar billboard approximately two miles from the billboard in question. The record does not indicate whether there are material differences in the size and location of the Lamar Advertising billboard and the billboard at Courtesy Ford.

³⁸ Brown Resp. at 2.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

advertisement as a \$1,363.37 in-kind contribution from Barksdale on its disclosure reports.⁴²

Neither Courtesy Ford nor Barksdale responded to the Complaint.

The Act defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."⁴³ "Anything of value" includes all in-kind contributions and, generally, the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services."⁴⁴ If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee.⁴⁵ At the time of Brown's campaign, the individual per-election contribution limit for candidates was \$2,600.⁴⁶ No candidate or political committee shall knowingly accept any contribution in excess of this limit.⁴⁷ Further, it is unlawful for a corporation to make any contribution or expenditure in

⁴² *Id.* In its 2014 April Quarterly Report, the Committee disclosed an in-kind contribution of \$966.77 for the billboard ad, with a notation that it was valued at \$19.73 per day. *See* Amended April Quarter Report, filed November 17, 2014, at 7, 43 (disclosing in-kind contribution from Barksdale and accompanying disbursement). *See also* Amended 2014 July Quarterly Report, filed November 17, 2014, at 5, 17 (disclosing an in-kind contribution from Barksdale of \$394.60). Barksdale did not make any other contributions to the Committee. Thus, the total reported in-kind contribution amount is \$1,363.37. The Federal Committee does not explain how it arrived at its valuation of the billboard.

⁴³ 52 U.S.C. §30101(8)(A)(i).

⁴⁴ 11 C.F.R. § 100.52(d)(1).

⁴⁵ *Id.*

⁴⁶ *See* 52 U.S.C. § 30116(a)(1)(A).

⁴⁷ 52 U.S.C. §§ 30116(a)(2)(A); 30116(f).

1 connection with any election to federal office.⁴⁸ Finally, the Act requires that political
2 committees disclose all contributions and source information.⁴⁹

3 There are facts that could support finding reason to believe and authorizing an
4 investigation. The picture attached to the Complaint clearly shows that the second version
5 of the billboard did not include a disclaimer. Further, Complainant estimate of the ad's
6 value is over eight times the Brown Respondents' estimate. Only the Complainant provides
7 information in support of his estimate, but it is not clear whether the two signs are
8 comparable.⁵⁰ However, given the particular circumstances of this case, we do not believe it
9 would be an effective use of the Commission's resources to conduct an investigation. There
10 may not be a significant difference between the value of the billboard and what was reported
11 by the Federal Committee, and there appear to be some factors that would make an
12 investigation difficult.⁵¹ Accordingly, we recommend that the Commission dismiss as a
13 matter of prosecutorial discretion the allegations that the Committee received an excessive
14 or prohibited contribution, the Committee failed to report the contribution, and the billboard
15 failed to contain a disclaimer.⁵²

⁴⁸ 52 U.S.C. § 30118(a).

⁴⁹ 52 U.S.C. § 30104(b).

⁵⁰ For example, the photograph of the billboard attached to the Complaint suggests that the billboard may have displayed alternating ads, thus significantly reducing the ad's value compared to a static ad. Compl., Attach. 11. Other matters might also merit investigation, such as whether Barksdale, Courtesy Ford, or some other entity owned the billboard and whether the first version of the billboard was an independent or a coordinated communication.

⁵¹ For example, Barksdale and Courtesy Ford did not respond to the Complaint, despite representations to OGC that they would submit one, and the Committee was allowed to terminate in 2015.

⁵² *Heckler v. Chaney*, 470 U.S. 821 (1985).

2. The Commission Should Dismiss the Remaining Disclaimer and Reporting Allegations

The Complaint alleges that the Committee failed to include proper disclaimers on campaign advertisements and on other campaign materials, including t-shirts, yard signs, and "hand cards."⁵³ Further, the Complaint alleges some of Brown's other campaign ads lacked proper disclaimers.⁵⁴ Finally, the Complaint alleges that the Committee did not report disbursements for the campaign materials.⁵⁵

The Brown Respondents explain that Brown did not believe that he had to include disclaimers for materials that he paid for personally in the earliest stages of his campaign.⁵⁶ As a result of the complaint, Brown states that he amended disclosure reports to include expenditures for these items, and that all items produced after the Complaint's receipt included proper disclaimers.⁵⁷

Whenever an authorized committee makes a disbursement for the purpose of financing any public communication, the communication must include a disclaimer stating the authorized committee paid for the communication.⁵⁸ Wearing apparel and certain small items are excepted from these requirements.⁵⁹ The Committee must also disclose

⁵³ Compl. at 6.

⁵⁴ Compl. at 6, Attach. 11.

⁵⁵ *Id.*

⁵⁶ Resp. at 2-3.

⁵⁷ Brown Resp. at 3.

⁵⁸ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1), (b).

⁵⁹ 11 C.F.R. § 110.11(f)(i), (ii)

1 disbursements related to the communication in disclosure reports filed with the

2 Commission.⁶⁰

3 We recommend that the Commission dismiss these allegations. First, the t-shirts are
4 wearing apparel, which is excepted from the disclaimer requirement, and, although we lack
5 information to be sure, the "hand cards" might qualify for the "small item" exception.

6 Regarding the flyers and advertisements attached to the complaint, they did not contain

7 disclaimers, but to the extent disclaimers were required, the communications appeared to

8 have supplied sufficient information to indicate who was responsible for them, and the

9 Respondents state that after they received the Complaint, they began placing disclaimers on

10 their materials, including the yard signs.⁶¹ Finally, although the Brown Committee should

11 have reported these disbursements⁶², it later amended its reports to do so, and the amounts

12 did not appear to be significant ⁶³

⁶⁰ 52 U.S.C. § 30104(a).

⁶¹ See MUR 7012 (Mike Sweeney 4 Congress) and MUR 6879 (Ralph Abraham for Congress).

⁶² The Committee amended its initial disclosure reports to include an in-kind contribution of \$975 for yard signs and \$465.34 for campaign t-shirts. <http://docquery.fec.gov/pdf/823/14960673823/14960673823.pdf>.

⁶³ *Heckler v. Chaney*, 470 U.S. 821 (1985).

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IV. RECOMMENDATIONS

1. Find reason to believe Thomas E. Brown, Thomas E. Brown, Jr. Sheriff, and Thomas Brown for Congress, and George D.N. Coletti in his official capacity as treasurer violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d) regarding a poll;
2. Find reason to believe that Thomas E. Brown and Thomas Brown for Congress, and George D.N. Coletti in his official capacity as treasurer violated 52 U.S.C. §§ 30102(e)(1) and 30103(a), respectively;
3. Find reason to believe that Thomas Brown for Congress, and George D.N. Coletti in his official capacity as treasurer violated 52 U.S.C. §30104(a),(b);
4. Dismiss the allegation that Thomas E. Brown, Thomas Brown for Congress, and George D.N. Coletti in his official capacity as treasurer, Jackson Barksdale, and Courtesy Ford, Inc. violated 52 U.S.C. §§ 30116(a)(1) and (2); 30118(a); and 30120(a) regarding a billboard advertisement;
5. Approve the attached Factual and Legal Analyses;
6. Approve the attached conciliation agreement; and
7. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

Kathleen M. Guith
Acting Associate General Counsel

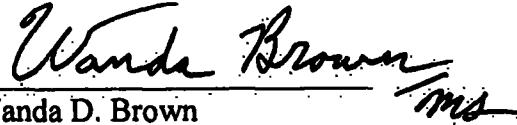
1.18.17
Date

By:


Stephen A. Gura
Deputy Associate General Counsel



Mark D. Shonkwiler
Assistant General Counsel



Wanda D. Brown
Attorney

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Thomas Brown for Congress and MUR 6803
George D.N. Coletti in his official
capacity as treasurer (Formerly
Citizens 4 Thomas Brown Exploratory)

I. INTRODUCTION

The Complaint alleges that Thomas Brown for Congress (formerly Citizens 4 Thomas Brown Exploratory) and George D.N. Coletti in his official capacity as treasurer ("Federal Committee") committed various violations of the Federal Election Campaign Act of 1971, as amended ("the Act").¹ Specifically, the Complaint alleges that the Committee, principal campaign committee for Thomas Brown, a 2014 candidate in the Democratic Primary for Georgia's Fourth Congressional District, used \$12,000 in non-federal funds from Brown's state political committee, Thomas E. Brown Jr. Sheriff ("State Committee") to pay for polling that benefited the Federal Committee.² The Complaint also alleges that the Federal Committee untimely filed its Statement of Organization.³ Further, the Complaint alleges that the Federal Committee accepted either a prohibited or excessive in-kind contribution in the form of advertisements on an electronic billboard, and the advertisements lacked disclaimers.⁴ Finally, the Complaint alleges various other disclaimer and reporting issues.⁵

¹ Compl. at 1-2 (April 3, 2014). Brown lost the May 2014 primary election.

² Compl. at 2.

³ Compl. at 1-2.

⁴ Compl. at 4-5.

⁵ Compl. at 6.

As set forth below, the Commission exercised its prosecutorial discretion and dismissed these allegations.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

Thomas E. Brown was re-elected to a four-year term as Sheriff of DeKalb County, Georgia, in 2012.⁶ On July 17, 2013, Brown announced the formation of an exploratory committee for a possible 2014 congressional candidacy.⁷ On September 12, 2013, Brown decided to become a candidate,⁸ and on October 30, 2013, Brown filed a Statement of Candidacy and his Committee's Statement of Organization.⁹ The Committee terminated as a reporting entity on June 11, 2015.¹⁰ The last report filed by the Committee was its 2014 Year End Report.

B. Polling Used for the Benefit of the Federal Campaign

In January and February 2013, the State Committee made two payments of \$6,000 each (\$12,000 total) to a vendor for a telephone poll.¹¹ The Complaint alleges that the poll was

⁶ See Georgia Government Transparency and Campaign Finance Commission at http://media.ethics.ga.gov/search/campaign/Campaign_Name.aspx?NameID=10929&FilerID=C2011002303&Type=candidate. Brown resigned in July 2014 in order to run for Congress.

⁷ Compl., Attach. 8. (News report of Brown's announcement of exploratory committee).

⁸ Response at 1 (Apr. 25 2014).

⁹ FEC Form 2, Statement of Candidacy for Thomas Brown at <http://docquery.fec.gov/pdf/185/13031134185/13031134185.pdf>. FEC Form 1, Statement of Organization for Thomas Brown for Congress at <http://docquery.fec.gov/pdf/190/13031134190/13031134190.pdf>. While Brown claims to have mailed the forms to the Commission in mid-September 2013, the Commission did not receive them until October 30, 2013. Resp. at 1. A copy of an Express Mail envelope attached to the Complaint indicates that the statements were not mailed until October 29, 2013. Compl., Attach. 2 (Express Mail envelope).

¹⁰ See <http://docquery.fec.gov/pdf/711/15330083711/15330083711.pdf>.

¹¹ In campaign finance reports filed with the Georgia Ethics Commission on July 1, 2013, the State Committee disclosed two expenditures, one on January 24, 2013, and the other on February 24, 2013, paid to "HEG" for the purpose of "Research." Documents attached to the Complaint indicate that HEG is a political consulting firm, and it offers polling services. Compl., Attach. 4 at 1-2.

1 conducted throughout Georgia's Fourth Congressional District and tested Brown's name
2 recognition and popularity against Fourth Congressional District Representative Hank Johnson,
3 DeKalb County Commissioner Lee May, and former DeKalb County District Attorney Gwen
4 Keyes Flemming, all purported potential candidates for the 2014 Congressional race.¹²
5 Complainant argues that the poll must have been conducted for federal purposes because Brown
6 did not face re-election as Sheriff until 2016 and the poll included some Fourth District residents
7 who lived outside DeKalb County.¹³

8 Respondents acknowledge that the State Committee funded the telephone poll to assess
9 Brown's visibility and approval ratings, but contend that it was conducted only in DeKalb
10 County for what Brown describes as "my own political purposes."¹⁴ Respondents do not dispute
11 that the poll tested Brown's name recognition against potential 2014 congressional candidates
12 nor do they deny that the polling was used to assess the viability of Brown's 2014 Congressional
13 candidacy.¹⁵

14 Under the Act, a federal candidate, the agent of a candidate, or an entity directly or
15 indirectly established, financed, maintained, or controlled by, or acting on behalf of a candidate,
16 shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for
17 Federal office" unless the funds are subject to the Act's "limitations, prohibitions, and reporting
18 requirements."¹⁶ Moreover, Commission regulations prohibit the transfer of funds or assets from

¹² Compl. at 2-3.

¹³ *Id.*

¹⁴ Brown Resp. at 1-2.

¹⁵ See Brown Resp. at 1-2.

¹⁶ 52 U.S.C. § 30125(e). Disclosure reports filed with the Georgia Transparency and Campaign Finance Commission show numerous corporate monetary and in-kind contributions made to and accepted by the State Committee.

1 a candidate's nonfederal campaign committee to his or her federal campaign committee.¹⁷
2 Federal political committees are required to report contributions received from individuals and
3 political committees, and no candidate or political committee shall knowingly accept any
4 prohibited or excessive contribution.¹⁸

5 An individual becomes a "candidate" when he or she receives or makes in excess of
6 \$5,000 in contributions or expenditures.¹⁹ However, Commission regulations provide that the
7 terms "contribution" and "expenditure" do not include funds or payments made solely to
8 determine whether an individual should become a candidate.²⁰ These "testing the waters"
9 activities include polling, among other things.²¹ However, all funds used for "testing the waters"
10 activities must be permissible under the Act.²² An individual may form an exploratory
11 committee solely for the purposes of testing the waters, which is not defined as a "political
12 committee" and, therefore, not required to register with the Committee and file disclosure
13 reports.²³ If the individual subsequently become a candidate, the funds received and payments

http://media.ethics.ga.gov/search/campaign/Campaign_Name.aspx?NameID=10929&FilerID=C2011002303&Type=candidate.

¹⁷ 11 C.F.R. § 110.3(d). *See, e.g.*, MUR 6267 (Paton For Senate) (Paton's federal committee received prohibited transfer of funds when Paton's state senate committee paid for polling and a survey benefiting his federal campaign); MUR 5646 (Cohen for New Hampshire) (Cohen's federal committee received prohibited transfer of funds when Cohen's state committee paid for start-up expenses related to his U.S. Senate campaign); and MUR 5426 (Dale Schultz for Congress) (Schultz's federal committee received prohibited transfer of funds when the Schultz state committee paid for expenses that the candidate incurred in connection with his federal election).

¹⁸ 52 U.S.C. §§ 30104(b); 30116(a)(2)(A); 30116(f).

¹⁹ 52 U.S.C. § 30101(2).

²⁰ 11 C.F.R. §§ 100.72(a) and 100.131(a).

²¹ *Id.*

²² *Id.*

²³ *See Advisory Op. 1979-26 (Grassley)* at 1-2. If the individual subsequently becomes a candidate, the funds received and spent become contributions and expenditures and must be reported with the first report filed by the campaign committee of the candidate. 11 C.F.R. §§ 100.72(a) and 100.131(a).

1 made become contributions and expenditures, respectively, subject to the Act's reporting
2 requirements.²⁴ Georgia law permits corporations and unions to make political contributions.²⁵

3 This "testing the waters" exemption is no longer available after an individual becomes a
4 candidate by raising or spending more than \$5,000 and engages in campaigning activities which
5 indicate that he or she has decided to run for a particular office.²⁶ This includes making written
6 or oral statements that refer to himself or herself as a candidate, and conducting activities in
7 close proximity to the election.²⁷

8 When an individual becomes a "candidate," the Act requires the candidate to file a
9 Statement of Candidacy designating a candidate's principal campaign committee within fifteen
10 days, and requires the principal campaign committee to file a Statement of Organization no later
11 than ten days after the candidate's designation.²⁸

12 Based on the available information, it appears that Brown used State Committee funds to
13 pay for a poll to help him decide whether to run for Congress in 2014. In addition to the alleged
14 name testing against potential congressional candidates and the proximity to the announcement
15 of his exploratory efforts, two different contemporaneous news articles attached to the Complaint
16 quote Brown—when talking about his potential candidacy—as stating that he had "one set of

²⁴ *Id.*

²⁵ See O.C.G.A. § 21-5-41 to 43 (Contribution to candidates for public office, including contribution limitations).

²⁶ 11 C.F.R. §§ 100.72(b) and 100.131(b).

²⁷ *Id.*

²⁸ 52 U.S.C. §§ 30102(e)(1) and 30103(a).

1 encouraging poll numbers but was waiting to see more.”²⁹ It is reasonable to assume that the set
2 of poll numbers to which Brown referred was the set from the poll paid for by his State
3 Committee. Further, Brown states that he ordered the poll for “his own political purposes,”
4 which is not inconsistent with considering a federal candidacy, as the Complaint alleges. The
5 most reasonable conclusion is that Brown used poll results paid for by his State Committee to
6 test the waters for a federal candidacy. Thus, it appears that the Federal Committee received
7 assets from the State Committee, and did not report the transfer.

8 However, under the particular circumstances of this case, including the fact that the
9 Committee terminated in 2015, the Commission, in furtherance of the Commission’s priorities,
10 relative to other matters pending on the Enforcement docket, exercised its prosecutorial
11 discretion and dismissed this allegation.³⁰

12 C. Untimely Statement of Organization

13
14 In his response, Brown states that he became a candidate on September 12, 2013, but the
15 Commission’s records show that he filed his Statement of Candidacy on October 30, 2013, and
16 the Committee filed its Statement of Organization the same day. Thus, the candidacy statement
17 should have been filed by September 27, 2013, and the organizational statement was due on
18 October 7, 2013, making the actual filings 33 and 23 days late, respectively. Accordingly, it
19 appears that the Committee violated 52 U.S.C. § 30103(a).³¹ Because this statement was not

²⁹ Compl., Attach. 1, Rockdale News, *DeKalb County Sheriff Thomas Brown Announced Formation of an Exploratory Committee for a Bid for the Fourth Congressional Seat* (July 17, 2014); Attach 8, WXIA TV, *Sheriff Brown Gauges run Against Rep. Johnson* (July 17, 2014).

³⁰ *Heckler v. Chaney*, 470 U.S. 821 (1985).

³¹ Some of Brown’s July statements might be interpreted to mean that he had already decided to run for Congress when he announced his exploratory committee on July 17, 2013 (“I do want to go to Congress,” and “I’m running on being an effective leader for the fourth district”), but other reported statements from the same press conference suggest he was only considering a run (“Brown says his fundraising prowess in the next few weeks will help him make a final decision on his congressional candidacy.”) See *Compl.*, Attach. 8.

1 filed timely, the Committee also failed to file a 2013 October Quarterly Report, and did not file
2 its initial report until January 2014.³² However, under the particular circumstances of this case,
3 including the fact that the Committee terminated in 2015, in furtherance of the Commission's
4 priorities, relative to other matters pending on the Enforcement docket, exercised its
5 prosecutorial discretion and dismissed this allegation.³³

6 **D. Allegations Regarding the Billboard**

7
8 Starting in October 2013 and apparently continuing until Georgia's primary election in
9 May 2014, Brown's name was displayed on an electronic billboard at a car dealership called
10 Courtesy Ford, Inc., which is located beside a major interstate highway.³⁴ The Complainant
11 states that a supporter posted a photograph of the sign on Brown's Facebook page and wrote that
12 the sign was donated to Brown by an anonymous contributor.³⁵ Photographs attached to the
13 Complaint show two messages on the billboard: one that simply displays Brown's name next to
14 a checked box, and another that displays Brown's headshot and reads, "Tom Brown for
15 Congress/Vote Tuesday, May 20th."³⁶

16 The Complaint alleges that Brown and the Committee accepted a potentially excessive
17 and prohibited corporate in-kind contribution related to the advertisement.³⁷ The Complaint also
18 asserts that the billboard never included a disclaimer indicating who paid for the ad, in violation
19 of 52 U.S.C. § 30120(a)(2), and that the Committee did not disclose either an expenditure or an

32 52 U.S.C. § 30104(b).

33 *Heckler v. Chaney*, 470 U.S. 821 (1985).

34 Compl. at 4-5.

35 *Id.*; Attach. 9. The Facebook page of Thomas Brown for Congress no longer contains any posts.

36 Compl., Attach. 9.

37 Compl. at 4-5.

1 in-kind contribution for the billboard advertising.³⁸ Complainant estimates the value of the
2 billboard to be as high as \$11,225.³⁹

3 The Brown Respondents state that in the summer of 2013, Jay Barksdale, an executive
4 with "an automobile dealership in Rockdale County," heard about the possibility of Brown's run
5 for Congress and approached him about making a campaign billboard that he owned available to
6 Brown's campaign.⁴⁰ Brown says that he told Barksdale that if he decided to become a
7 candidate, he would accept the offer to use the billboard.⁴¹ The Brown Respondents further
8 contend that before Brown declared his candidacy, Barksdale, without any request from Brown
9 or his Committee, placed the name "Tom Brown" and a checkmark on the billboard.⁴² The
10 message did not explain who Brown was or that he was running for any office. Brown further
11 declared that he believed that Barksdale, as the purported owner, was free to place whatever
12 message he desired on his billboard.⁴³ Starting in 2014, after Brown announced his candidacy,
13 the Federal Committee reported the billboard advertisement as a \$1,363.37 in-kind contribution
14 from Barksdale on its disclosure reports.⁴⁴

³⁸ *Id.*

³⁹ To value the cost of the advertisement, the Complainant relies on the monthly rate (\$2,250 per month) quoted by Lamar Advertising Company, a billboard advertising company in the Atlanta area, for what he contends is a similar billboard approximately two miles from the billboard in question. The record does not indicate whether there are material differences in the size and location of the Lamar Advertising billboard and the billboard at Courtesy Ford.

⁴⁰ Brown Resp. at 2.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* In its 2014 April Quarterly Report, the Committee disclosed an in-kind contribution of \$966.77 for the billboard ad, with a notation that it was valued at \$19.73 per day. See Amended April Quarter Report, filed November 17, 2014, at 7, 43 (disclosing an in-kind contribution from Barksdale and accompanying disbursement). See also Amended 2014 July Quarterly Report, filed November 17, 2014, at 5, 17 (disclosing an in-kind contribution

1 The Act defines "contribution" to include "any gift, subscription, loan, advance, or
2 deposit of money or anything of value made by any person for the purpose of influencing any
3 election for Federal office."⁴⁵ "Anything of value" includes all in-kind contributions and,
4 generally, the provision of any goods or services without charge or at a charge that is less than
5 the usual and normal charge for such goods or services."⁴⁶ If goods or services are provided at
6 less than the usual and normal charge, the amount of the in-kind contribution is the difference
7 between the usual and normal charge for the goods or services at the time of the contribution and
8 the amount charged the political committee.⁴⁷ At the time of Brown's campaign, the individual
9 per-election contribution limit for candidates was \$2,600.⁴⁸ No candidate or political committee
10 shall knowingly accept any contribution in excess of this limit.⁴⁹ Further, it is unlawful for a
11 corporation to make any contribution or expenditure in connection with any election to federal
12 office.⁵⁰ Finally, the Act requires that political committees disclose all contributions and source
13 information.⁵¹

14 The picture attached to the Complaint clearly shows that the second version of the
15 billboard did not include a disclaimer. Further, Complainant's estimate of the ad's value is over

from Barksdale of \$394.60). Barksdale did not make any other contributions to the Committee. Thus, the total reported in-kind contribution amount is \$1,363.37. The Federal Committee does not explain how it arrived at its valuation of the billboard.

⁴⁵ 52 U.S.C. §30101(8)(A)(i).

⁴⁶ 11 C.F.R. § 100.52(d)(1).

⁴⁷ *Id.*

⁴⁸ See 52 U.S.C. § 30116(a)(1)(A).

⁴⁹ 52 U.S.C. §§ 30116(a)(2)(A); 30116(f).

⁵⁰ 52 U.S.C. § 30118(a).

⁵¹ 52 U.S.C. § 30104(b).

1 eight times the Brown Respondents' estimate. Only the Complainant provides information in
2 support of his estimate, but it is not clear whether the two signs are comparable.⁵² However,
3 given the particular circumstances of this case, including the Committee's termination, we do not
4 believe it would be an effective use of the Commission's resources to conduct an investigation or
5 proceed further. There may not be a significant difference between the value of the billboard and
6 what was reported by the Federal Committee. Accordingly, the Commission dismissed as a
7 matter of prosecutorial discretion the allegations that the Committee received an excessive or
8 prohibited contribution, the Committee failed to report the contribution, and the billboard failed
9 to contain a disclaimer.⁵³

10 **E. Remaining Disclaimer and Reporting Allegations**

11 The Complaint alleges that the Committee failed to include proper disclaimers on
12 campaign advertisements and on other campaign materials, including t-shirts, yard signs, and
13 "hand cards."⁵⁴ Further, the Complaint alleges some of Brown's other campaign ads lacked
14 proper disclaimers.⁵⁵ Finally, the Complaint alleges that the Committee did not report
15 disbursements for the campaign materials.⁵⁶

16 The Brown Respondents explain that Brown did not believe that he had to include
17 disclaimers for materials that he paid for personally in the earliest stages of his campaign.⁵⁷ As a

⁵² For example, the photograph of the billboard attached to the Complaint suggests that the billboard may have displayed alternating ads, thus significantly reducing the ad's value compared to a static ad. Compl., Attach. 11.

⁵³ *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁵⁴ Compl. at 6.

⁵⁵ Compl. at 6, Attach. 11.

⁵⁶ *Id.*

⁵⁷ Resp. at 2-3.

1 result of the Complaint, Brown states that he amended disclosure reports to include expenditures
2 for these items, and that all items produced after the Complaint's receipt included proper
3 disclaimers.⁵⁸

4 Whenever an authorized committee makes a disbursement for the purpose of financing
5 any public communication, the communication must include a disclaimer stating the authorized
6 committee paid for the communication.⁵⁹ Wearing apparel and certain small items are excepted
7 from these requirements.⁶⁰ The Committee must also disclose disbursements related to the
8 communication in disclosure reports filed with the Commission.⁶¹

9 The Commission exercised its prosecutorial discretion and dismissed these allegations.⁶²
10 First, the t-shirts are wearing apparel, which is excepted from the disclaimer requirement, and it
11 is possible that the "hand cards" might qualify for the "small item" exception. Regarding the
12 flyers and advertisements attached to the Complaint, they did not contain disclaimers, but to the
13 extent disclaimers were required, the communications appeared to have supplied sufficient
14 information to indicate who was responsible for them, and the Respondents state that after they
15 received the Complaint, they began placing disclaimers on their materials, including the yard
16 signs.⁶³ Finally, although the Committee, which is terminated, should have reported these

⁵⁸ Brown Resp. at 3.

⁵⁹ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(1), (b).

⁶⁰ 11 C.F.R. § 110.11(f)(i), (ii)

⁶¹ 52 U.S.C. § 30104(a).

⁶² *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁶³ See MUR 7012 (Mike Sweeney 4 Congress) and MUR 6879 (Ralph Abraham for Congress).

- 1 disbursements, it later amended its reports to do so, and the amounts did not appear to be
- 2 significant.⁶⁴

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⁶⁴ The Committee amended its initial disclosure reports to include an in-kind contribution of \$975 for yard signs and \$465.34 for campaign t-shirts. <http://docquery.fec.gov/pdf/823/14960673823/14960673823.pdf>.